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No. 07-68

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IN THE SUPREME COURT OF THE UNITED STATES

DAVID ANGEL DIAZ, Petitioner,

v.

JAMES E. TILTON, SECRETARY, CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION.

ON PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the state court's rejection of petitioner's federal juror-dismissal claim was governed by the deferential standard of federal habeas corpus review provided by 28 U.S.C. § 2254.

2. Whether the state appellate court's decision, upholding the trial court's dismissal of a juror because she was unable to deliberate, was "unreasonable" or "contrary to" "clearly established Federal law" within the meaning of § 2254.

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IN THE SUPREME COURT OF THE UNITED STATES

No. 07-68

DAVID ANGEL DIAZ, Petitioner,

v.

JAMES E. TILTON, SECRETARY, CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION.

STATEMENT OF THE CASE

The Eastlake and Clover gangs were bitter rivals. On the night of July 14, 1998, petitioner, a member of the Eastlake gang, was riding in a car driven by another member of the Eastlake gang. The driver stopped at a stop sign as Remberto Preciado was walking across the intersection with his girlfriend and her brother. Petitioner said, "I am going to waste him," or "I am going to blast him," or words to that effect. Petitioner walked up to Preciado and asked him, "Hey, homey, where are you from?" Preciado, a member of the Eastside Clover gang, replied, "I am from Clover."

Petitioner pulled out a handgun and repeatedly shot Preciado from a distance of about five or six feet. After petitioner stopped shooting, he got back into the car and the driver drove away. Mr. Preciado was taken to a hospital where he was treated for his gunshot wounds. He had two bullet holes in the upper portion of one leg

and two more bullet holes in the lower portion of the same leg. The femoral artery in his lower leg was destroyed, and the fibula bone in the lower leg was shattered.

At his state-court jury trial on charges arising from the shooting of Mr. Preciado, petitioner put on an alibi defense, i.e., that he was attending a movie at the time Mr. Preciado was shot. Petitioner was convicted of attempted murder, aggravated mayhem, assault by means likely to produce great bodily injury, and assault with a semi-automatic firearm. The trial court sentenced petitioner to state prison for 37 years to life. *People* v. *Diaz*, 95 Cal.App.4th 695, 697-98, 115 Cal.Rptr.2d 799 (2002); Appendix to Opposition Brief (Opp. App. at 1-2).

In his direct appeal to the California Court of Appeal, petitioner claimed that the trial judge had violated his state and federal rights by removing an alleged "holdout" juror during deliberations. The court of appeal affirmed his conviction. Petitioner then filed a petition for review in the California Supreme Court. The California Supreme Court granted the petition for review, vacated the California Court of Appeal's opinion, and remanded the cause to the Court of Appeal for reconsideration in light of *People* v. *Cleveland*, 25 Cal.4th 466, 106 Cal.Rptr.2d 313, 21 P.3d 1225 (2001), an intervening case involving dismissal of a juror for inability to deliberate. (Appendix to petition (Pet. App.) at 8.) On remand, the Court of Appeal again affirmed petitioner' conviction, concluding that the judge had acted properly in light of evidence that the juror was not deliberating and had not been candid with the judge

about it. *People* v. *Diaz* , 95 Cal.App.4th at 699-705, 708; Opp. App. at 4-13, 17.

Petitioner filed another petition for review in the California Supreme Court, but that petition was denied. Petitioner then filed a petition for writ of certiorari in this Court. This Court denied that petition on October 7, 2002. *Diaz* v. *California*, 537 U.S. 907 (2002) (mem.); Pet. at 3.

Petitioner thereafter filed a petition for writ of habeas corpus in the United States District Court for the Central District of California (Pet. App. at 7), claiming that the removal of the so-called "holdout" juror had violated his Sixth Amendment right to a fair and impartial jury. He also argued that the state appellate court had not actually "adjudicated" his federal claim "on the merits," so that the federal habeas corpus court should review it "de novo," rather than deferentially under 28 U.S.C. § 2254. A federal magistrate judge recommended that the petition be denied, and the District Court entered an order approving the magistrate judge's recommendation and dismissing the petition. The District Court subsequently granted petitioner's request for a certificate of appealability. (Pet. at 3-4.)

In an unpublished memorandum opinion filed on February 27, 2007, the United States Court of Appeals for the Ninth Circuit affirmed the District Court's denial of petitioner's habeas corpus petition. (Pet. App. at 1-4.) The panel held that the deferential § 2254 standard applied to petitioner's claim, and that relief was unavailable because the state court's determination that the removed juror had been unable to deliberate

was not an "unreasonable determination of the facts" and was not contrary to or an unreasonable application of clearly-established law. (Pet. App. 4.) The Ninth Circuit denied petitioner's petition for rehearing and petition for rehearing en banc. (Pet. App. at 28.)

REASONS WHY CERTIORARI SHOULD BE DENIED

Introduction.

Petitioner argues (1) that deferential review under 28 U.S.C. § 2254(d) is inappropriate because the state court never adjudicated the merits of his federal claim, and (2) that habeas corpus relief was required anyway because the state court decision was "contrary to" or an "unreasonable application" of "clearly-established law" under § 2254(d). Certiorari review, however, is unwarranted.

First, petitioner's argument about the appropriate standard of review is bound up in a preliminary factual issue resolved against him below. Further, petitioner is wrong in asserting that the standard-of-review question reflects a significant conflict among the circuit courts of appeals. In addition, the state court ruling was entitled to deferential review in view of the nature of petitioner's claim and the explanation offered by the state court; and the crucial finding of fact that supported its resolution of petitioner's contention would have been entitled to deference regardless of whether the state court had adjudicated petitioner's federal claim "on the merits."

The state court decision, moreover, was a fact-bound one not warranting certiorari review. And it did not depart from "clearly established law." Indeed, it was completely correct.

I. Certiorari is Not Warranted on the Standard-of-Review Question.

Petitioner contends that this Court should grant certiorari to resolve what he asserts is a conflict between the decisions of several circuits of the United States Court of Appeals as to whether a federal constitutional claim has been "adjudicated on the merits" within the meaning of § 2254(d) if a state prisoner has raised an issue in state court under both state law and under the United States Constitution, and the state court issues a decision that explicitly addresses only the state law aspect of the claim but does not mention the federal constitutional aspect of the claim. (Pet. at 13-17.)

Under 28 U.S.C. § 2254(d), as amended by the Antiterrorism and Effective Death Penalty Act (AEDPA),

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgement of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States; or

> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

In addition—and regardless of whether the state court adjudicated the merits of the petitioner's federal claim—§ 2254(e) mandates a presumption of correctness for a state court's finding of fact. Section § 2254(e)(1) provides:

> In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

Here, the federal courts correctly discerned that petitioner had received an "adjudication on the merits" of his federal claim. That finding was entitled to deferential review in any event. And, despite petitioner's argument to the contrary, there is no significant conflict among the circuits warranting certiorari review of the standard-of-review question he presents.

A. The state court adjudicated petitioner's claim on the merits.

1. In petitioner's case, the California Court of Appeal stated, "Diaz contends the trial court erred by discharging one of the jurors during deliberations. This claim is meritless." *People* v. *Diaz*, 95 Cal.App.4th at

699; (Opp. App. at 4). The fact that the California Court of Appeal in its opinion did not cite the United States Constitution or any United States Supreme Court cases in its opinion did not disqualify it from the deferential review provided by § 2254. A state court need not even be aware of applicable United States Supreme Court precedent in denying a state defendant's claim so long as neither the reasoning nor the result of the state-court decision contradicts them. *Mitchell* v. *Esparza*, 540 U.S. 12, 16 (2003) (per curiam); *Early* v. *Packer*, 537 U.S. 3, 8 (2002) (per curiam).

2. Moreover, in ruling against petitioner on his claim that it was error to discharge a juror during deliberations, the California Court of Appeal relied on the California Supreme Court's decisions in *People* v. *Cleveland*, 25 Cal.4th 466, 106 Cal.Rptr.2d 313, 21 P.3d 1225 (2001) and *People* v. *Collins*, 17 Cal.3d 687, 131 Cal.Rptr. 782, 552 P.2d 742 (1976). *Diaz*, 95 Cal.App.4th at 700, 703, 705; Opp. App. at 4, 9, 12. In resolving the issue in those cases of whether it was proper for a trial court to discharge a juror during deliberations, the California Supreme Court in *Cleveland* and *Diaz* cited the Sixth Amendment to the United States Constitution (*Cleveland*, 25 Cal4th at 487; *Collins*, 17 Cal.3d at 692), decisions of the United States Supreme Court (*Collins*, 17 Cal.3d at 692 n.3), and decisions of three circuits of the United States Court of Appeals (*Cleveland*, 25 Cal.4th at 480-484). The California Court of Appeal's reliance on the California Supreme Court's decisions in *Cleveland* and *Collins* thus demonstrates an adjudication on the merits of petitioner's federal constitutional claim of error, for a state court may adjudicate a federal constitutional claim on the merits by citing to state court decisions that

decided the same federal constitutional issue. *Harris* v. *Kuhlman*, 346 F.3d 330, 343 n.8 (2d Cir. 2003); *Baker v. City of Blaine*, 221 F.3d 1108, 1112 (9th Cir. 2000); see *Dibenedetto* v. *Hall*, 272 F.3d 1, 6 (1st Cir. 2001).

3. This conclusion was confirmed by the findings of the federal courts below based on the way petitioner's state appeal was litigated. In its opinion affirming the District Court's denial of petitioner's habeas corpus petition, the Ninth Circuit explained:

> In his [state court] appeal, Diaz cited the Sixth Amendment, federal law and California state law in arguing that the trial court erred in dismissing Juror No. 5, without making any distinction between a [California Penal Code] section 1089 claim and a Sixth Amendment claim. While Diaz listed various standards for juror dismissal under both California and federal law, he did so in the context of a single argument that the trial court's action was erroneous. The California Court of Appeal's decision that the trial court's actions were not erroneous therefore constituted an implicit adjudication of Diaz's Sixth Amendment claim, despite the court's failure to mention the Sixth Amendment or Supreme Court precedent. *See Early* v. *Packer*, 537 U.S. 3, 8 (2002); *Lambert* v. *Blodgett*, 393 F.3d 943, 969 (9th Cir. 2004). We conclude that the decision by the California Court of Appeal constituted a decision on the merits of Diaz's Sixth Amendment claim as required under AEDPA.

(Pet. App. at 2-3.) Given the way petitioner's claim was in fact raised and litigated in state court, the state appellate court's ruling in any event must be deemed an "adjudication on the merits" regardless of whether it would be deemed such an adjudication simply on the basis of the face of the written ruling.

4. The District Court also correctly concluded that the state court had adjudicated petitioner's federal juror-dismissal claim on the merits.

> Here, the California Court of Appeal clearly addressed Petitioner's juror dismissal claim on the merits, rather than dismissing it on a procedural ground. Although the state court applied the standard set forth in Cal. Penal Code § 1089 for the discharge and substitution of jurors, the Ninth Circuit has held that this procedure preserves the "essential feature" of the jury required by the Sixth and Fourteenth Amendments. See *Miller* v. *Stagner*, 757 F.2d 988, 995 (9th Cir), amended, 768 F.2d 1090 (9th Cir. 1985). As such, the state court adjudicated Petitioner's claim on the merits, and the AEDPA standard applies.

(Pet. App. at 13.)

B. The state court's crucial finding of fact was entitled to deference.

Deferential review was required in this case anyway. Here, the state trial court determined that the challenged juror in fact was unable to deliberate. As the Ninth Circuit panel recognized, this determination was reasonable. (Pet. App. at 4.) So, regardless of whether the state court adjudicated petitioner's federal claim "on the merits" so as to entitle its decision to deference

under § 2254(d), its crucial determination was nevertheless entitled to equivalent deference under the long-standing presumption of correctness afforded to state-court fact-finding provided by § 2254(e). Properly presumed correct under § 2254(e), the finding that the juror in fact was unable to deliberate completely undermines petitioner's stated claim. (See, e.g., *Schriro* v. *Landrigan*, ___ U.S. ___, 127 S.Ct. 1933, 1940-1942 (2007) (crucial fact that defendant had impeded counsel's validated rejection of ineffective-assistance claim).

C. There is no conflict in the courts of appeals justifying certiorari review.

Petitioner overstates things when he asserts that there is a conflict among the circuits on whether the § 2254(d) deference standard applies when the state court opinion did not explicitly address the federal nature of a petitioner's claim.

In support of his assertion that there is a conflict between decisions of various circuits of the United States Court of Appeals as to what constitutes an adjudication "on the merits" under 28 U.S.C. § 2254 when a state prisoner raises a claim under both state law and the United States Constitution, but the state court decision addresses only the state law aspect of the claim, petitioner cites *Appel v. Horn*, 250 F.3d 203 (3d Cir. 2001); *Fortini v. Murphy*, 257 F.3d 39 (1st Cir. 2001); *Weeks v. Angelone*, 176 F.3d 249 (4th Cir. 1999); and *Morris v. Burnett*, 319 F.3d 1254 (10th Cir. 2003). (Pet at 16-17). However, as respondent will now discuss, the decisions in *Appel*, *Fortini*, *Weeks*, and *Morris* are not in conflict with the decisions of the District Court and the Ninth Circuit in the present case.

In *Appel*, 250 F.3d at 209-11, the Third Circuit held that the AEDPA's deferential standard of review was inapplicable because the state courts had treated *Appel's* claim that he had been constructively denied his Sixth Amendment right to assistance of counsel as a claim of ineffective assistance of counsel and, therefore, the state courts had never reached the merits of *Appel's* claim that he was denied the assistance of counsel. In the instant case, however, the state courts never mischaracterized the nature of petitioner's claim that the trial court erred by discharging Juror No. 5.

In *Fortini*, 257 F.3d at 47, the First Circuit ruled that Fortini's federal claim had never been adjudicated "on the merits" by the state courts and, therefore, it would review the claim de novo. The decision in *Fortini* is not inconsistent with the case at bench given the circumstance that, as observed by the Ninth Circuit, although at the state court level petitioner listed various standards for juror dismissal under both California and federal law, he did so in the context of a single argument without making a distinction between his state law claim and his Sixth Amendment claim. (Pet. App. at 2-3.) Moreover, the California Court of Appeal in its opinion specifically stated that petitioner's claim of error regarding the discharge of Juror No. 5 was "meritless." *People v. Diaz*, 95 Cal.App.4th at 699; (Opp. App. at 4.)

In *Weeks*, 176 F.3d at 258, the Fourth Circuit stated, "When a petitioner has properly presented a claim to the state court but the state court has not adjudicated the claim on the merits, however, our review of questions of law and mixed questions of law and fact is de novo." The Fourth Circuit then ruled that the

Virginia Supreme Court had adjudicated Weeks's claim in issue "on the merits" because in rejecting the claim that court stated Weeks "effectively presents no argument in support of" the claim, and "[D]efendant raises a number of miscellaneous claims . . . . We have considered all arguments in support of those issues and conclude that *none has any merit*." *Id.* at 259. The result in *Weeks*, therefore, is consistent with the instant case in that the California Court of Appeal specifically ruled that petitioner's claim that the trial court erred by discharging Juror No. 5 was "meritless." *People v. Diaz, supra*, 95 Cal.App.4th at 699; (Opp. at 4.)

In *Morris*, 319 F.3d at 1266-67, the Tenth Circuit ruled that the Colorado Court of Appeal had not adjudicated "on the merits" the petitioner's claim, raised in an eleven-page portion of his opening brief on appeal, that the exclusion of a witness's testimony deprived him of his constitutional right to present a defense because the Colorado Court of Appeal never mentioned this claim in its opinion denying petitioner relief. However, as already mentioned by respondent, the California Court of Appeal specifically found that petitioner's claim that a juror erroneously was discharged during deliberations was "meritless," thereby addressing the claim.

II. Certiorari Should Be Denied on Petitioner's Juror-dismissal Claim.

Petitioner asserts that it was "objectively unreasonable" under "clearly established Federal law" for the trial court to discharge the lone holdout juror, Juror No. 5, during the jury's deliberations at his state court trial. He claims that certiorari should be granted to settle the question of what constitutes a state trial

court's unreasonable interference with a criminal defendant's Sixth Amendment right to a fair and impartial jury when the trial court, during jury deliberations, dismisses a holdout juror who professes to be willing and able to deliberate fairly. (Pet. at 18-20; see Pet. at 8-13.)

Petitioner's claim does not warrant a grant of certiorari, first, because it is based on a misstatement of fact. The central premise of petitioner's argument is that Juror No. 5 was a holdout juror. The record shows that she was not. Moreover, petitioner's claim is inherently fact-bound; and, as explained above, the state court's finding that the juror in fact could not deliberate must be presumed correct. Finally, petitioner can cite no decisions of this Court that "clearly establish" any rule from which the state court may be said to have departed. The state-court decision and the decisions below were correct.

A. Petitioner's claim is based on the unsupported assertion that the juror was a "holdout" for a not-guilty verdict.

The state court of appeal, in its careful review of the record, expressly rejected petitioner's argument that Juror No. 5 had been holding out against a guilty verdict. Pointing to the evidence that the juror had not been deliberating, the court found that "she could not have been a legitimate holdout juror." *People v. Diaz*, 95 Cal.App.4th at 704; Opp. App. at 10. The District Court read the record in exactly the same way and explained its conclusion in its opinion denying habeas corpus relief to petitioner:

> Petitioner also faults the trial court for

> discharging Juror No. 5 because she was the "lone juror holding out for acquittal." (Petition at 16.) According to Petitioner, the trial court's dismissal of Juror No. 5 resulted in "entrusting the determination of whether Petitioner was innocent or guilty to a tribunal organized to convict." (Petition at 17-18.) This argument lacks merit. First, Petitioner cites no evidence showing that Juror No. 5 was, in fact, the "lone juror holding out for acquittal." Indeed, during argument on Petitioner's new trial motion, defense counsel stated that Juror No. 5 was one of the two jurors for a verdict of not guilty. (RT at 880.)[1/] Second, nothing in the record suggests that the trial court knew that Juror No. 5 was for acquittal. Before questioning the jurors, the trial court cautioned: "I don't want you to offer anything that goes to your mind-set, how you are deliberating, what your vote may be, or questions of facts or evidence." (RT at 808, see also RT at 799, 803, 814.) And during discussion of Petitioner's new trial motion, the trial court stated: "I specifically asked all jurors not to indicate which way the vote was going, and there was no indication which way the vote was going, so I don't know what [Juror No. 5] was voting for at all." (RT at 880.)
>
> (Pet. App. at 25-26.)

Moreover, before the trial court started questioning Juror No. 5 regarding claims by other jurors that she was refusing to deliberate, the court told Juror No. 5:

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1. RT refers to the Reporter's Transcript of petitioner's state court trial.

> I am going to have to ask you some questions, and the first thing I want you to know is that we are not allowed to know exactly what your mind-set is in regards to which way you are voting or anything about the facts or the evidence that were discussed in there. It is really important, we're not allowed to do that.
>
> Here's the situation. What I need for you to do is, when I ask you these questions, talk to me about in general things that are occurring between you and the jurors in terms of your getting along, but please don't include specific facts about the case." (RT at 802-803.)

The record thus belies petitioner's assertion that Juror No. 5 was the lone juror holding out for acquittal. More importantly, nothing in the record suggests that the trial court had received any information that Juror No. 5 was holding out for acquittal before the court discharged the juror. In short, the facts of this case do not present the error or support the claimed constitutional violation which petitioner asks this court to review. This Court should not grant certiorari to decide under what circumstances the discharge of a holdout juror by a state trial court constitutes an objectively unreasonable interference of a criminal defendant's right to a fair and impartial jury in a case where that did not happen.

B. The state court decision did not transgress "clearly established" law.

Petitioner acknowledges that, if the deferential standard of 28 U.S.C. section 2254(d) applies, he must show that the state court's resolution of his claim was

either contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by this Court. (Pet. at 18.) Petitioner has not and cannot make this showing. He cites no case from this Court which discusses, let alone clearly establishes a federal constitutional rule for evaluating the circumstances under which a trial court may discharge a juror for failing to deliberate.

In affirming the District Court's denial of petitioner's habeas corpus petition, the Ninth Circuit noted "the lack of directly controlling United States Supreme Court authority on this issue. . . ." (Pet. App. at 4.) Citing *Carey* v. *Musladin*, ___ U.S. ___, 127 S.Ct. 649, 654 (2006), the Ninth Circuit then correctly held that, under those circumstances, "the California Court of Appeal's conclusion that the trial court properly discharged Juror No. 5 was not contrary to, nor an unreasonable application of, clearly established federal law." (Pet. App. at 4.) In *Musladin*, this Court observed that its "lack of guidance" on the issue presented to the state court had resulted in "an open question in our jurisprudence." *Musladin*, 127 S.Ct. at 654. The Court explained that "[n]o holding of this Court required" the application of the standard or test proposed by the petitioner. *Id.* And, indeed, petitioner's certiorari petition does not propose any particular standard or test; it just asks for "guidance" in resolving the "thorny problem" of balancing jury secrecy with the need to root out juror misconduct. (Pet. at 19.)

This Court emphasized the same limitation on federal habeas review in *Kane* v. *Garcia Espitia*, 546 U.S. 9, 10 (2005) (per curiam). There, the Ninth Circuit held that pro se defendants have a constitutional right to access to

a law library. This Court pointedly observed that the Ninth Circuit had not identified "a source in our case law" for the law library access right. *Id.* at 10. Given that lack of guidance, in the instant case, the Ninth Circuit correctly concluded that the absence of a "clearly established" federal constitutional principle meant that the state court did not make an unreasonable application of clearly established law.

Petitioner cites no "clearly established" law from this Court's opinions on the question of how to deal mid-trial with a juror who might not be able to deliberate. He cites only this Court's precedents on the different question of whether the Constitution prohibits drastically purging "for cause," from a capital case, jurors who simply harbor some moral scruples against the death penalty. (Pet. at 18.) Otherwise, he cites mere circuit-court opinions to the effect that a juror may not be removed because of his doubts about the sufficiency of the evidence. But circuit cases cannot "clearly establish" the law applicable under § 2254(d). Moreover, in the case at bar, the juror was removed for reasons different from doubts about the State's evidence. In addition, it is not clear how cases dealing with the removal of one juror would apply to the States, which are not required by the Constitution to provide for unanimous verdicts in criminal cases. See *Apodaca* v. *Oregon*, 406 U.S. 404 (1972); *Duncan* v. *Louisiana*, 391 U.S. 145 (1968). In any event, under the nonretroactivity doctrine set forth in *Teague v. Lane*, 489 U.S. 288 (1989), any rule this Court might promulgate as to when it is proper to discharge a holdout juror also would not be applicable to grant petitioner relief.

C. The decision below is bound up in the unique facts of this case.

As noted above, the state courts in this case determined that Juror 5 in fact was unable to deliberate, and the federal courts credited that determination. This Court should not grant certiorari to decide what constitutes a violation of a criminal defendant's right to a fair and impartial jury when a state court discharges a so-called "holdout" juror because whether the discharge of even a holdout juror violated a defendant's right to a fair and impartial jury will depend on the specific facts and circumstances that led to the discharge of the juror in every individual case in which the issue arises. In other words, the matter in issue is not one that would be subject to a bright-line rule of law that would be applicable to every situation in which a holdout juror has been discharged. There are, of course, situations in which it is proper for a trial court to discharge a juror who is holding out for acquittal. *Perez v. Marshall*, 119 F.3d 1422, 1427 (9th Cir. 1997); *United States v. Huntress*, 956 F.2d 1309, 1311-13 (5th Cir. 1992). However, given the virtually infinite variety of circumstances which may justify the discharge of a holdout juror, the propriety of discharging a juror will of necessity be something that must be decided on a case-by-case basis and thus would not be subject to resolution by reference to a narrow rule of law applicable to each and every case.

D. The decision below was correct.

The state-court decision and the federal-court decisions below were correct. Both the District Court and the Ninth Circuit denied petitioner's claim of error on the merits after a thorough discussion of the facts that led to the removal of Juror No. 5. Moreover, as the

Ninth Circuit appropriately observed:

> A trial court's findings regarding juror fitness are entitled to special deference because trial court's are "in a superior position to observe [jurors'] physical appearance and demeanor and thereby to determine [their] ability to continue deliberating." *Perez v. Marshall*, 119 F.3d 1422, 1427 (9th Cir. 1997). The trial court also spoke with three other jurors, all of whom agreed that Juror No. 5 wasn't willing to deliberate fully with the other jurors.

(Pet. App. at 3-4.) Because trial courts are in the best position to determine a juror's ability to continue deliberating, a trial court's findings regarding a juror's fitness to continue deliberating would be entitled to special deference under any standard of review.

Furthermore, in affirming petitioner's conviction, the California Court of Appeal relied upon California Penal Code section 1089, which allows a trial court to discharge a juror who "upon . . . good cause shown to the court is found to be unable to perform [her] duty." *Diaz*, 95 Cal.App.4th at 699-700; Opp. App. at 4. As the Ninth Circuit observed below (Pet. App. at 4), removal of a juror pursuant to California Penal Code section 1089 is constitutional because the statute preserves the essential feature of the jury required by the Sixth and Fourteenth Amendments. *Perez v. Marshall*, 119 F.3d at 1426; *Miller v. Stagner*, 757 F.2d 988, 995 and n.3, amended 768 F.2d 1090 (9th Cir. 1985).

CONCLUSION

The petition for writ of certiorari should be denied.

Dated: November 15, 2007

Respectfully submitted,

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APPENDIX

CERTIFIED FOR PUBLICATION
IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION THREE

THE PEOPLE,
Plaintiff and Respondent,
v.
DAVID ANGEL DIAZ,
Defendant and Appellant.
B137926
(Super. Ct. No. BA183957)

APPEAL from a judgment of the Superior Court of Los Angeles County, Tricia Ann Bigelow, Judge. Affirmed as modified.

Barbara A. Smith, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, David P. Druliner, Chief Assistant Attorney General, Carol Wendelin Pollack, Senior Assistant Attorney General, Robert F. Katz, Supervising Deputy Attorney General, and Roy C. Preminger, Deputy Attorney General, for Plaintiff and Respondent.

Defendant and appellant, David Angel Diaz, appeals from the judgment entered following his conviction, by jury trial, for attempted murder, aggravated mayhem, assault by means likely to produce great bodily injury, and assault with a semi-automatic weapon, with enhancements for discharging a

firearm causing great bodily injury, firearm use and infliction of great bodily injury (Pen. Code, §§ 664/187, 205, 245, subd. (a)(1), 245, subd. (b), 12022.53, subd. (d), 12022.5, 12022.7).[1/] Sentenced to a state prison term of 37 years to life, Diaz contends there was trial and sentencing error.

The judgment is affirmed as modified.

BACKGROUND

Viewed in accordance with the usual rule of appellate review (*People v. Ochoa*(1993) 6 Cal.4th 1199, 1206), the evidence established the following.

1. *Prosecution evidence.*

K.P. and defendant Diaz were members of the Eastlake Gang. The Eastlake Gang and the Clover Gang, bitter rivals, were at war. On the night of July 14, 1998, K.P. was driving in his car with his girlfriend, Jeanette V. K.P. saw Diaz in the street and picked him up. Neither K.P. nor Jeanette knew Diaz had a gun.

Remberto P. a member of the Eastside Clover Gang, was walking across the intersection of Griffin Avenue and Manitou Street with his girlfriend, Martha S., and her 13-year-old brother. When K.P. came to a stop sign at the intersection of Griffin and Manitou, Diaz got out of the car saying something like, "I am going to waste him," or "I am going to blast him." Diaz walked up to Remberto and asked, "Where are you from?" Remberto knew Diaz was asking what gang he was from and he replied, "I am from Clover." Diaz pulled out a handgun, shot at Remberto numerous times, and then got back into K.P.'s car.

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1. All further statutory references are to the Penal Code unless otherwise specified.

Remberto was hit twice in the leg, the bullets destroying the femoral artery of his lower leg and shattering his fibula.

K.P. drove to the home of Diaz's girlfriend, Juana C., and parked at the rear of the property. K.P., Jeanette, and Diaz got out of the car. K.P. and Jeanette walked away together, and Diaz walked away in a different direction. K.P. and Jeanette retrieved the car early the next morning.

Police Officer Armando Rodriguez responded to the scene and spoke with Remberto's girlfriend, Martha. Martha told Rodriguez she recognized the gunman, whom he knew by his moniker "Drifter," and that Drifter was a member of the Eastlake Gang. Officer Juan Parga spoke to Martha a little later that same night. Martha told Parga she knew the gunman from high school, that his name was David, that he was also known as Drifter, and that he was from the Eastlake Gang. Martha identified a photograph of Diaz as the gunman.

Officer Jose Ramirez interviewed Martha about a week after the shooting. Martha told him she knew the person who shot Remberto, and that she had gone to junior high school and high school with the gunman. Martha showed Ramirez an eighth grade year book and pointed out a photograph of Diaz.

2. *Defense evidence.*

Diaz's sister testified that she, Diaz and his girlfriend Juana were at the movies on the night Remberto was shot.

Juana's father testified he was cleaning up his backyard sometime after 9:00 p.m. on July 14, 1998, when a small car crashed into his garage. A girl and a Chinese man got out of the car. The man pulled up his shirt and displayed a gun. Then the two of them jumped over the back fence. Juana's mother, who

was inside the house, looked out the window when she heard the crash and she saw Jeanette and a man get out of the car.

CONTENTIONS

1. The trial court erred by discharging a juror during deliberations.

2. The trial court erred by admitting the preliminary hearing testimony of a putatively unavailable witness.

3. The concurrent sentences on counts 2, 3 and 4 violate section 654.

DISCUSSION

1. *Discharged juror.*

Diaz contends the trial court erred by discharging one of the jurors during deliberations. This claim is meritless.

Penal Code section 1089 allows the trial court to discharge a juror who "upon . . . good cause shown to the court is found to be unable to perform [her] duty." " 'We review for abuse of discretion the trial court's determination to discharge a juror and order an alternative to serve. [Citation.] If there is any substantial evidence supporting the trial court's ruling, we will uphold it. [Citation.] We also have stated, however, that a juror's inability to perform as a juror " 'must appear in the record as a demonstrable reality.' " [Citation.]' [Citation.]" (*People v. Cleveland* (2001) 25 Cal.4th 466, 474.)

After only two hours of deliberation, the foreperson of Diaz's jury sent the trial court a note saying, "A juror refuses to deliberate further. We believe that this violates instruction

number 17.41.1. We want further guidance from the court." Commenting that it wanted to find out "whether it is an honest difference of opinion or whether or not there is, in fact, a juror who is not deliberating," the trial judge had the jury foreperson, Juror No. 9, brought into the courtroom. The foreperson said Juror No. 5 was "intimidated by us needing to discuss her opinion and ours and she just feels ganged up on because she is by herself," and that "her position and her attitude is, this is how I feel, and there is nothing to discuss." Although Juror No. 5 had initially participated in deliberations, she subsequently began refusing to discuss anything, saying only, "This is how I feel." "[E]verything was going fine until like the last 10 or 15 minutes when we realized that this is where we all were positioned. . . . [B]ut, when we had the difference, there was no discussing it further. 'This is how I feel.' " "We tried, like, two or three times to encourage her. And everybody calmed down and backed off and just tried to ease the situation and then approach it again, and it was just – that's it." "When the other jurors told her they weren't ganging up on her and not to take it personally, Juror No. 5 said "she feels like it is [personal]. She is completely intimidated . . . ."

The trial court indicated it wanted to question Juror No. 5, and counsel did not object. The trial court asked Juror No. 5 if she was having difficulty in the jury room. She said, "I think I am," and began to cry. She said she had been discussing her opinion and the factual basis for it with the other jurors, "[b]ut they are . . . all bombarding me and I am just telling them the way that my belief – ." Pointing out that deliberations had only been going on for about two hours (after a two-week trial), the court reminded her to "decide the case for yourself, but you should do so only after discussing the evidence and the instructions with the other jurors," and that "it is rarely helpful for a juror at the beginning of deliberation to express an

emphatic opinion on the case or to announce a determination to stand for a certain verdict."

The trial court then had Juror No. 11 brought into the courtroom. Juror No. 11 said that although Juror No. 5 had initially participated in deliberations, she stopped doing so and now refused to discuss the evidence. When the other jurors asked Juror No. 5 to discuss her position, she refused, saying: "That's it. I am not going to discuss it any more." She complained the other jurors were "ganging up" on her. The trial court brought in Juror No. 1, who said Juror No. 5 had initially deliberated, but then stopped because she felt the other jurors were attacking her. "The Court: Okay. When you ask her to discuss the case or the facts, what does she say? [¶] Juror No. 1: 'You are all attacking me.' [¶] The Court: Is it your perception that, in fact, Juror No. 5 is being attacked? [¶] Juror No. 1: No. [¶] The Court: Okay. Tell me why not. [¶] Juror 7 No. 1: We have asked that she explain her thoughts and why she feels that way, and perhaps we could then understand the reason why she is feeling the way she is feeling."

The trial court had all the jurors and alternates brought in for a rereading of the instructions relating to juror duties, and then excused them for the day. The next morning, the court indicated it felt further questioning of Juror No. 5 was necessary to determine if she was either refusing to deliberate or incapable of deliberating because she felt intimidated. Juror No. 5 was brought in and the trial court asked: "Yesterday you said you felt intimidated by the other jurors and, in fact, it was something that brought you to tears. [¶] Do you still feel intimidated by the other jurors?" She said, "No, your Honor. I was going through a lot. My brother-in-law was very sick and he died yesterday." She then said, "It has been kind of hard for me, but I am doing better now, your Honor." When the trial court asked if this personal loss wouldn't make it hard for her to

deliberate because "[i]t sounded like yesterday that interfered with it," she replied, "Well, I didn't know that he had died until I got home." She said her brother-in-law's illness had been bothering her the day before, but when the trial court asked if she thought that was why she had been having problems in the jury room, she said: "No. There was a lot of problems in there. But, I think I can do my job, your Honor. [¶] The Court: Okay. What has changed to make you think so? [¶] Juror No. 5: I made up my mind that I am a juror and I have to do my job and, like you told me, weigh the evidence, and I am going to do my job." Asked if her brother-in-law's death wouldn't affect her, she said: "No, your Honor, because he is not suffering anymore. He was suffering a lot; he had bilateral kidney failure and he was on the machine. So he is not suffering any more." When the trial court asked what had changed since the day before to make her feel she was not going to be intimidated anymore, Juror No. 5 replied: "Because I have got a lot of prayer and I know the Lord will bring me through. Your Honor, that's how I feel. That's my belief."

The trial court indicated to counsel it felt that Juror No. 5's answers had raised questions about her "candor and reliability" because, during the previous day's questioning, she hadn't said anything about her brother-in-law's illness. "She said she was intimidated by the others. And she said that in that case she hadn't discussed the case with [the] others, and yesterday she said nothing about the fact that her brother-in law was near death and that was prohibiting her from being able to make a determination in regards to this case – " "[I]t almost seems to me that there is good cause on just a number of levels. First of all, the juror has lied about what was a problem for her. First she said it was intimidating, and then she says she is emotionally upset because her brother-in-law was near death. Then she finds out overnight that he has, in fact, passed away. And I question whether or not that death . . . isn't going to

continue to interfere with her ability to make decisions in this case, in light of what happened yesterday, and how she wasn't forthcoming." The trial court noted the three jurors examined had all "indicated that [Juror No. 5] did fail to perform her duty to deliberate. All of the jurors indicated that she talked for a while and then stopped, and refused to talk anymore with the other jurors." The trial court concluded: "I have had an opportunity to observe all . . . four jurors that I have made inquiry of and see their facial expressions, the tone and manner of the way that they discussed things. And it's my call that I think that Juror No. 5 is emotionally distraught and couldn't say it yesterday, and still looked emotionally distraught today, and I find it difficult that she didn't fully disclose, and I do find there is good cause under those three situations: failure to deliberate, the fact of feeling intimidated, and also the fact that apparently her mind wanders and makes her recalcitrant to deliberate when she feels someone is in ill health by her admission today. [¶] So, . . . I am going to determine that there is good cause to excuse Juror No. 5."

Responding to a subsequent new trial motion, the trial court amplified its explanation. The court noted that all three of the other jurors examined agreed "that after a relatively short period, be it an hour or two hours, after a 10-day trial, that [Juror No. 5] was no longer taking part in the decisions – or discussing the facts of [the] case. [¶] And when she was first confronted with that decision, she said that she was deliberating, although she felt intimidated, and that she was trying to do that. But the next day she basically comes in and contradicts her story and says that . . . the difficulty in her deliberations yesterday [was] due to the fact that she was upset, and understandably so, at the life-threatening illness that she had been worried about with her brother-in-law. [¶] And so, that wasn't disclosed the first day . . . ." "[B]asically my decision was made on the failure to deliberate, failure to be honest about

what was taking place, her feeling intimidated, and the difficulties that one would reasonably have as a result of that."

Refusal to deliberate constitutes good cause for removal. "A refusal to deliberate consists of a juror's unwillingness to engage in the deliberative process; that is, he or she will not participate in discussions with fellow jurors by listening to their views and by expressing his or her own views. Examples of refusal to deliberate include, but are not limited to, expressing a fixed conclusion at the beginning of deliberations and refusing to consider other points of view, refusing to speak to other jurors, and attempting to separate oneself physically from the remainder of the jury. The circumstance that a juror does not deliberate well or relies upon faulty logic or analysis does not constitute a refusal to deliberate and is not a ground for discharge." (*People v. Cleveland, supra,* 25 Cal.4th at p. 485.) "[W]e adhere to the established California law authorizing a trial court, if put on notice that a juror is not participating in deliberations, to conduct 'whatever inquiry is reasonably necessary to determine' whether such grounds exist [citation] and to discharge the juror if it appears as a 'demonstrable reality' that the juror is unable or unwilling to deliberate. [Citations.]" (*Id.* at p. 484.) In addition, both trial-related and non-trial-related stress can provide good cause for discharging a juror. (See *People v. Fudge* (1994) 7 Cal.4th 1075, 1099-1100 [anxiety about new job]; *People v. Collins* (1976) 17 Cal.3d 687, 696 [juror said she could not decide case "on the evidence and the law since she was involved emotionally more than intellectually," "that she could not follow the court's instructions, [and] that she had been upset throughout the trial"]; *People v. Warren* (1986) 176 Cal.App.3d 324, 326-327 [juror said she was so intimidated by other jurors she was likely to vote with majority and against her own conscience]; see also *In re Mendes* (1979) 23 Cal.3d 847, 852 [trial court properly granted juror's pretrial request to be excused on assumption her

"normal grief" over brother's sudden death "would make it exceedingly difficult for [her] to concentrate"].)

Diaz argues Juror No. 5 was not refusing to deliberate, but that – having properly deliberated and reached a decision – she was simply holding out against a guilty verdict. Diaz argues that in these circumstances the removal of Juror No. 5 was improper under *People v. Castorena* (1996) 47 Cal.App.4th 1051. However, there is little similarity between the two cases. The trial court in *Castorena* never questioned the removed juror, even after she wrote a letter alleging she had been properly deliberating and that the misconduct had been perpetrated by a different juror. *Castorena* held it had been an abuse of discretion to remove this juror because, without inquiring into her allegations, the trial court "did not have the requisite facts upon which to decide whether [the removed juror had] in fact failed to carry out her duty as a juror to deliberate or whether the jury's inability to reach a verdict was due, instead, simply to [the removed juror's] legitimate disagreement with the other jurors." (*Id.* at p. 1066.) Here, the trial court did inquire into the alleged misconduct before acting. The *Castorena* jury had already been deliberating for *days* when the issue of juror misconduct arose, whereas Diaz's jury had been deliberating for at most *two hours*. Moreover, Juror No. 5's own statement to the trial court the second time she was examined – when she said, "I made up my mind that I am a juror and I have to do my job and . . . weigh the evidence, and I am going to do my job" – demonstrates she had not been deliberating the day before and, therefore, that she could not have been a legitimate holdout juror.

Diaz also relies on *People v. Delamora* (1996) 48 Cal.App.4th 1850, where the trial court removed two jurors who had expressed concerns about not being compensated by their employers if they spent too much time on jury duty. The Court

of Appeal found an abuse of discretion, not because problems relating to a juror's employment may not provide a basis for a proper discharge, but because it was unclear whether there was actually such a problem in the case. The trial court had removed the two jurors – after they had been deliberating for more than three days – without first asking if they were willing to deliberate longer even if their employers would not pay them. "Although a trial court does not abuse its discretion when it discharges a juror because of problems related to the juror's employment, the employment problem must be real and not imagined." (*Id.* at p. 1855.) *Delamora* is inapposite because Juror No. 5 was not discharged until after the trial court questioned her.

Juror No. 5's demeanor and responses when initially questioned by the trial court revealed that she was extremely upset. Her responses to the next day's follow-up questioning demonstrated that her distress had caused her to stop deliberating, and revealed a troubling equivocation as to why she had been distressed. The trial court was entitled to discount Juror No. 5's verbal declarations when the y conflicted with her demeanor. (See *People v. Lucas* (1995) 12 Cal.4th 415, 489 ["Although the juror stated the cancellation of her vacation would not affect the discharge of her duties as a juror, her behavior and demeanor supplied substantial evidence to the contrary. She had repeatedly brought the problem of the vacation to the court's attention, exhibiting concern and agitation over it. The court determined that the juror's demeanor indicated her ability to deliberate fairly would be substantially impaired if the penalty trial caused her to cancel her vacation."]; *People v. Beeler* (1995) 9 Cal.4th 953, 989 [recognizing importance of trial court's observation of juror's demeanor in reviewing decision to discharge]; *People v. Halsey* (1993) 12 Cal.App.4th 885, 892 [trial court properly removed juror because his evasions under questioning led court to

conclude he had violated order not to discuss case and lacked ability to follow instructions, keep open mind, and be objective].)

Finally, we cannot agree with Diaz that the recent *Cleveland* decision demonstrates the trial court erred. In *Cleveland*, the record failed to establish a refusal to deliberate as a demonstrable reality because "it became apparent under questioning that the juror simply viewed the evidence differently from the way the rest of the jury viewed it." (*People v. Cleveland, supra,* 25 Cal.4th at p. 486.) "It is possible that Juror No. 1 employed faulty logic and reached an 'incorrect' result, but it cannot properly be said that he refused to deliberate. Juror No. 1 participated in deliberations, attempting to explain, however inarticulately, the basis for his conclusion that the evidence was insufficient to prove an attempted robbery, and he listened, even if less than sympathetically, to the contrary views of his fellow jurors. [¶] Under these circumstances, we conclude that the trial court abused its discretion in excusing Juror No. 1." (*Id.* at p. 486.)

Here, on the other hand, the initial questioning of Juror No. 5 revealed that she might indeed be refusing to deliberate because she felt intimidated by the other jurors, even though she insisted she had been deliberating properly. When the trial court examined her the next day, however, Juror No. 5 gave several different stories. First she seemed to blame her emotional distress the day before on her brother-in-law's death. Then she conceded it hadn't been the death which upset her (because she didn't learn of it until that night), but that it had been her brother-in-law's illness. Based on its observation of Juror No. 5's demeanor, the trial court concluded she had not been truthful the day before and that her ability to deliberate was being inhibited by something (either emotional upset caused by her brother-in-law's illness, or intimidation by the

other jurors, or a combination of both). And as noted above, Juror No. 5's own statements revealed that she had simply stopped deliberating on the first day. Thus, substantial evidence exists to support the trial court's conclusion that Juror No. 5 was not merely viewing the evidence differently from the other jurors; rather, she was having problems deliberating and she had not been candid about it. In these circumstances, the trial court did not abuse its discretion by discharging her.[2]

2. *Unavailable witness.*

Diaz contends the trial court erred by admitting Martha S's preliminary hearing testimony under Evidence Code section 1291 (former testimony of unavailable witness) because the prosecution failed to show diligent efforts had been made to secure her attendance at trial. This claim is meritless.

Under Evidence Code section 240, subdivision (a)(3), a person is "unavailable as a witness" within the meaning of Evidence Code section 1291 if she is absent and the proponent of her statement, although exercising due diligence, has been unable to secure her attendance at trial. The proponent of the evidence has the burden of establishing unavailability. (*People v. Cummings* (1993) 4 Cal.4th 1233, 1297.) An appellate court "will not reverse a trial court's determination [under § 240] simply because the defendant can conceive of some further step or avenue left unexplored by the prosecution. Where the record reveals, . . . that sustained and substantial good faith efforts were undertaken, the defendant's ability to suggest additional steps (usually, as here, with the benefit of hindsight) does not automatically render the prosecution's efforts 'unreasonable.'

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2. We also hold the trial court did not err by denying Diaz's new trial motion based on the claim Juror No. 5 had been improperly discharged.

[Citations.] The law requires only reasonable efforts, not prescient perfection." (*People v. McElroy* (1989) 208 Cal.App.3d 1415, 1428, disapproved on other grounds by *People v. Cromer* (2001) 24 Cal.4th 889, 900, fn. 3.) "That additional efforts might have been made or other lines of inquiry pursued does not affect [a] conclusion [there was due diligence] . . . . It is enough that the People used reasonable efforts to locate the witness." (*People v. Cummings*, *supra*, 4 Cal.4th at p. 1298.) A court cannot "properly impose upon the People an obligation to keep 'periodic tabs' on every material witness in a criminal case, for the administrative burdens of doing so would be prohibitive. Moreover, it is unclear what effective and reasonable controls the People could impose upon a witness who plans to leave the state, or simply 'disappear,' long before a trial date is set." (*People v. Hovey* (1988) 44 Cal.3d 543, 564.)

The Supreme Court has recently resolved the proper appellate standard of review for this issue, ruling that it is independent review. (*People v. Cromer, supra,* 24 Cal.4th at pp. 892-893 [in "evaluating a trial court's due diligence determination" the appellate court's "proper standard is independent, de novo, review rather than the more deferential abuse of discretion test"].) Under this standard of review, the trial court properly admitted Martha's preliminary hearing testimony. Diaz argues the police took a calculated risk Martha would be unavailable for trial when they did not try to subpoena her until just before the trial started, and that the prosecution should, therefore, have been charged with the consequences. However, we conclude not only that the prosecution demonstrated due diligence in trying to secure her presence at trial, but also that it is fairly clear Martha purposely made herself unavailable because she was unwilling to testify.

At the due diligence hearing, Officer Jose Ramirez testified he made more than five attempts to personally serve Martha with

the subpoena at the beginning of the trial. He spoke to her mother, who said she had no information. He went to schools Martha had attended, but he got no leads. He asked patrol officers on all three shifts to look for Martha, but they were unable to find her. In his presence, the victim made telephone calls to Martha's mother and brother. According to the brother, Martha knew the police were looking for her and she was determined not to testify. Ramirez checked with local hospitals and the Department of Motor Vehicles. He checked to see if Martha had been arrested recently.

Detective William Eagleson was one of the investigating officers. He testified that on September 23, 1998, he picked Martha up at her mother's house (where she was living), falsely told her he wanted to talk to her at the police station, and instead took her to the courthouse to testify at the preliminary hearing. Eagleson said this was the only way he could have gotten her to come to court. Martha had told him she didn't want to testify. She was very fearful because this was a gang case and her brothers were well-known members of the Clover Gang. Eagleson testified he knew Martha would be staying at her mother's house after the preliminary hearing because Martha was pregnant. Eagleson had extensive experience in gang-related investigations. In his professional opinion, serving a subpoena on Martha well in advance of trial would have only ensured her unavailability. After the preliminary hearing, Eagleson monitored Martha's whereabouts on a weekly basis. He knew the area where she lived and he talked to people there who said Martha was still living with her mother. Eagleson himself occasionally saw Martha around the neighborhood. Based on his general experience in gang cases, and on his specific experience with Martha, Eagleson's tactic would have been to subpoena her at the same time that he actually went to pick her up to bring her to court to testify. Giving Martha

advance warning would merely insure that she would leave the area that day to avoid testifying.

In light of this testimony, we agree with the trial court's conclusion that, "given the particular circumstances of this case, . . . the witness is actually making a calculated effort to avoid service of process. And therefore, the detective's decision to – how he decided to serve the subpoena, if he could have, certainly appears reasonable under the circumstances, given his personal knowledge of the witness. [¶] So, given my best judgment and reasoning, . . . under the totality of the circumstances, it does appear . . . that due diligence has been made." There was no error in admitting Martha's preliminary hearing testimony.[3]

3. *Section 654 violation.*

Diaz contends the trial court erred by not staying the sentences on counts 2, 3 and 4. This claim has merit.

The trial court sentenced Diaz to state prison for 37 years to life on his conviction for attempted murder under count 1 of the information. The trial court also sentenced him to 25 years to

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3. We also conclude the trial court did not err by denying Diaz's new trial motion, alleging newly discovered evidence, based on testimony from Martha S. that she was available for trial and would have testified Diaz was not the gunman. The trial court reasonably concluded Martha's new testimony was cumulative because it replicated her preliminary hearing testimony, during which she refused to identify Diaz and did her best to disavow the statements she had made to police at the time of the shooting identifying him as the gunman.

life on the aggravated mayhem conviction under count 2; six years on the aggravated assault conviction under count 3; and seven years on the aggravated assault conviction under count 4. The trial court then ordered the sentences on counts 2, 3 and 4 to run concurrently with the sentence on count 1.

Diaz argues, and the Attorney General concedes, that the concurrent sentences on counts 2, 3 and 4 should have been stayed pursuant to section 654 because those counts all involved charges based on the same single act of shooting a single victim. We agree. Diaz's concurrent prison sentence on counts 2, 3 and 4 must be stayed so long as the judgment on count 1 remains in full force and effect. (See *People v. Robinson* (1991) 226 Cal.App.3d 1581, 1587; *People v. Mulqueen* (1970) 9 Cal.App.3d 532, 547-548.)

DISPOSITION

The concurrent sentences on counts 2, 3 and 4 are hereby ordered stayed. As modified, the judgment is affirmed.

CERTIFIED FOR PUBLICATION
KLEIN, P.J.
We concur:
KITCHING, J. ALDRICH, J.